Off... Court U.S.
NOV 30 1900
JAMES H. McKENNEY, Clerk

No. 130.

Brf. of Andros for Respondents.

No. 130.

Filed Nov. 30, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

PACIFIC COAST STEAMSHIP COMPANY,

Petitioner,

v.

THE BANCROFT-WHITNEY COMPANY and A. HAAS, J. BARUCH and H. W. HELLMAN, Surviving Partners of the Firm of HELLMAN, HAAS & COMPANY.

Libelants and Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief on Behalf of Libelants and Respondents.

MILTON ANDROS,
Counsel for Libelants and Respondents.

..... CO., PRINTERS, SAN FRANCISCO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900

PACIFIC COAST STEAMSHIP COMPANY,

Petitioner,

v.

THE BANCROFT-WHITNEY COMPANY and A. HAAS, J. BARUCH and H. W. HELLMAN, Surviving Partners of the Firm of HELLMAN, HAAS & COMPANY.

No. 130.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

MAY IT PLEASE THE COURT:

As it is improbable that counsel for respondents will, before it will have become necessary for him to prepare and file his brief on their behalf, have an opportunity seasonably to examine the brief of counsel for the petitioner, for the purpose of replying to the same, or to controvert or accede to the statement of the case therein, he deems it proper to preface this brief with a statement of the facts as he understands them to exist, and also to refer to such parts of the pleadings as may be material to an

examination of the questions of law involved in the case. He also respectfully begs leave to add, that, for like reason, he will assume that the errors to be discussed are substantially those insisted on in the Court below, as well as in the petitioner's application for the writ of certiorari and his brief accompanying the same.

STATEMENT OF THE CASE.

In the latter part of April, 1888, the libelant, Bancroft-Whitney Company, a corporation, and the libelants, Hellman, Haas & Company, shipped at San Francisco on board of the steamship "Queen of the Pacific," owned by the Pacific Coast Steamship Company, claimant herein, and by that Company employed in the transportation of cargo and passengers, certain merchandise, that of Bancroft-Whitney Company, viz: certain cases of books, to be transported to San Diego, and that of Hellman, Haas & Co., viz: 50 cases canned vegetables, etc., to San Pedro, in the State of California, to be delivered to the respective consignees named in the bills of lading.

These several contracts of affreightment are evidenced by bills of lading, copies of which are made part of the libels. (Rec., pp. 8, 14.) By these bills of lading the steamship company acknowledged to have received the merchandise in apparent good order and condition, to be transported to the several ports therein mentioned, and there to be delivered in like apparent good order and condition, except, *inter alia*, that "the Company shall "not be held responsible for any damage or loss result-

"ing from fire at sea or in port, accidents to or from "machinery, boilers, or steam, or any other accident, or "dangers of the seas, rivers, roadsteads, harbors, or of "sail or steam navigation of what nature or kind so-"ever."

On the back of these bills of lading are printed the following conditions:

"It is understood that in the settlement of any claim "for loss of or damage to any of the above-mentioned "goods, said claim shall be restricted to the cash value "of such goods at the port of shipment at the date of "shipment.

"It is expressly agreed that all claims against the P. "C. S. S. Co., or of any of the stockholders of said "Company, for damage to or loss of any of the within "merchandise, must be presented to the Company "within thirty days from date hereof; and that after "thirty days from date hereof, no action, suit or proceed-"ing, in any court of justice, shall be brought against "said P. C. S. S. Co., or any of the stockholders thereof, "for any damage to or loss of said merchandise; and "the lapse of said thirty days shall be deemed a conclu-"sive bar and release of all right to recover against said "Company, or any of the stockholders thereof, for any "such damage or loss."

(This stipulation, to avoid unnecessary repetition, will hereafter be referred to as "*the thirty-day clause.*")

On the back of the bill of lading delivered to Hellman, Haas & Company was a list of the articles shipped under it, and opposite the item "ten cases salad oil" was stamped the words "owner's risk." The bill of lading

provides that "oils" are at owner's risk of leakage. (Rec, p. 15.)

At about two o'clock on the afternoon of the 29th day of April the steamship, with the merchandise of the libelants on board thereof, departed from the port of San Francisco bound for the port of San Diego, and way ports between San Francisco and the last-named port. (Alexander, R., p. 102.)

That about thirty minutes past two o'clock, on the morning of the 30th day of April, it was discovered that the vessel had sprung a leak on her starboard side, and that water was coming into a compartment in the between decks. (Alexander, R., p. 87.) The ship at this time had a list of from five to eight degrees to starboard which, when she reached Port Harford four or five hours afterward, had increased to an angle of thirty degrees. (Alexander, R., pp. 87, 90.) After departing from San Francisco and up to this point of time the vessel had not met with heavy weather, but only with the ordinary weather usually encountered at that season of the year on the coast of California between San Francisco and San Diego. (Alexander, R., p. 97.) Nor had she, so far as appears, met with any of the excepted perils or other accident that would satisfactorily at that time, or at all, account for this leak. (Alexander, R., p. 105.)

When the leak was discovered, the vessel was about 22 miles from Port Harford, (Alexander, R., p. 105) the first place where she would, in the course of her voyage after leaving San Francisco, make a landing for

the purpose of delivering and taking on cargo and passengers. (Alexander, R., p. 98.)

The master being unable, at that time, to ascertain the exact locality of the leak or the origin thereof so as to be able to take steps to stop the same, the vessel continued, in a leaking condition, on her way to Port Harford, where she arrived, about seven o'clock on the morning of the 30th day of April (Alexander, R., p. 92), and, when about 250 or 300 yards from the wharf where she usually made her landing, took the bottom in about 23 feet of water, and, in about 20 minutes thereafter, filled, by reason whereof the cargo was submerged. (Alexander, R., pp. 88, 90.)

Before the vessel reached Port Harford men were sent over the side of the vessel to see if, in respect to the place of the leak, "they could discover anything from the outside of the ship, and they could not." (Alexander, R., p. 96.)

Along the outside of the vessel beginning at a point about 20 or 30 feet from her stern and extending to a point 20 or 30 feet from her bow and from a foot to a foot and a half above the water line, was bolted a stringer or guard that stood out from her side about 14 inches. Over this guard the sea frequently washed. (Alexander, R., p. 98.)

No examination of the side of the ship was made below this stringer, which was about 6 or 8 inches above the *dead lights*. (Alexander, R., pp. 142–3.)

It appears that when at Port Harford, the place of the leak was discovered, and that it would have been above

the water line if the vessel had been on an even keel. (Alexander, R., p. 105.)

As soon as the services of a diver could be procured, he went down to ascertain the place of the leak, and, if possible, to stop it. Having found the place of the leak and stopped it, the water was then pumped out from the hold of the vessel, and on the morning of the fourth day after the leak was first discovered, the vessel left Port Harford and returned to San Francisco, arriving there the next day. (Alexander, R., p. 97.) On the passage to San Francisco she did not leak, the cause of it having been discovered and effectually remedied at Port Harford. (Alexander, R., pp. 141-2.)

After the return of the vessel to San Francisco the cargo was discharged at the seawall, and such portions of it as were not completely destroyed, were delivered to the various shippers thereof. On the 19th day of May, that portion of the cargo belonging to Hellman, Haas & Company, was by them sold at public auction, for the benefit of whom it might concern, for the sum of $1,262.20. (Test. Haas, R., p. 60; Newhall, R., p. 62). The goods were sold on the wharf where they were delivered from the steamship. (Test. Newhall, R., p. 65.)

On the 28th day of April, 1892 (Rec., pp. 8, 14), the libelant, Bancroft Whitney Company, and libelants, Hellman, Haas & Company, verified and filed their several libels "*in a cause of contract, civil and maritime*", against the said vessel, to recover damages for the injuries to their said merchandise by reason of

its having been wet by sea water in consequences of the leaky condition of said vessel and the subsequent submersion of the cargo at Port Harford.

The contract of affreightment under which the merchandise was shipped, and the conditions thereof on the part of the carrier to be performed as evidenced by the bills of lading, are specifically set forth in the second article of the libels. (Rec., pp. 5, 11). In the third article of the libels, it is averred that the merchandise was not delivered at the ports named in the contract of affreightment in like good order and condition as when received, or at all; "but, on the contrary, said mer-"chandise was returned to said port of San Francisco in "a greatly damaged condition, by reason of having been "wet with sea water during said voyage, which by "reason of the negligence of said Steamship Company, "its officers and servants, gained access to the interior "of said ship where said merchandise was stowed, "to-wit: on or about the 30th day of April, A D. "1888"; and concluded with the usual prayer for process, etc. (Rec., pp. 5, 11, 6, 12, 13.)

On the said 28th day of April, a monition for the arrest of the vessel was, according to the course of the proceeding of a court of admiralty, issued to the Marshal, who, on the 3rd day of May following, returned the same unexecuted, not having been able, as appears from the return, to find said vessel in his district. (Rec., p. 20.)

This return, was read in evidence by the proctor for the claimants "for the purpose of showing that the day this monition was received by the Marshal the

vessel was not in the District." (Rec., p. 138.) To explain this, Mr. Farrish, a deputy U. S. marshal, was called as a witness for the libelants. From his testimony it appears that neither the date of the return of the monition nor the entry in the books of the Marshal's office, as to the day when the monition was delivered to the Marshal, was conclusive as to that fact; that, notwithstanding the date of the return and the entry in the office book as to when it was received, it might have been delivered to the Marshal on the day it was issued, April 28th. (Rec., pp. 141–2–3.)

On the 4th of said May an *alias* monition was issued, and on that day, as appears from the *amended* return of the Marshal, he duly arrested the vessel. (Rec., p. 21.)

Thereupon the Pacific Coast Steamship Company, a corporation, appeared and claimed the vessel, and filed peremptory exceptions to the libels of the several libelants. (Rec., p. 22.)

These exceptions are, in substance:

1. That the libels show that the libelants had no cause of action and no lien against the steamship proceeded against.

2 That the libels show that the causes of action alleged therein are causes of action, if any, against the Pacific Coast Steamship Company, and not against the steamship.

3. That the causes of action set forth in the several libels are shown therein to have been waived and abandoned by the libelants prior to the filing of said libel

under the provisions of a special contract made between the libelants and the said steamship company.

4. That the said libels show that the demands asserted therein are barred by virtue of Sections 337 and 338 of the Code of Civil Procedure of the State of California, and Sections 2174, 2909 and 2911 of the Civil Code of said State.

(5.) Further, that the Court had not jurisdiction in the matter because said steamship was not, when said libels were filed in said court, within the Northern District of California, and within the jurisdiction of the court.

(6.) Further, that said steamship was not attached by the Marshal upon process issued on said libels until the 4th day of May, 1892, more than four years after the alleged injury complained of, prior to which time any lien theretofore existing upon the steamer by reason of the matters alleged in the libel, had expired by special contract, alleged, and by operation of law. (Rec., p. 22.)

These exceptions were overruled by the Court. (Rec. p. 31.)

To the overruling of the first, third, fourth, fifth and sixth, claimant assigns error. (Assignments 1, 2, 3, 4, 5, Rec., pp. 181–2.)

The sections of the Code of Civil Procedure referred to in the fourth exception relate to the periods prescribed for the commencement of actions, the material parts of which are as follows:

§ 337. "Within four years: An action upon any contract, obligation or liability founded upon an instrument in writing executed in this State."

§ 338. Within three years: Subdiv. 3. "An action for the taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property."

Those of the Civil Code referred to, relate to the obligations of common carriers and to liens in general, and are as follows:

"§ 2174. The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

"§ 2909. A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

"§ 2911. A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

The exceptions to the libel having been overruled, the claimant made answer thereto. (Rec., pp. 31, 32 *et seq.*)

Art. II. In the second article of the answer to the libel of Bancroft-Whitney Company it is denied that on the 28th day of April, or at any time, or at any place, the libelant shipped in good order and condition, or at all, one case of books on the steamship "Queen of the Pacific," belonging to or employed by the claimant, to be transported to San Diego or elsewhere, and to be delivered in like good order and condition as when received, or otherwise, unto Bancroft-Whitney Company; denied that the claimant when it received said goods on board of the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with the libelant, wherein it acknowledged to have received the goods

in apparent good order, or otherwise, or promised and agreed to transport the goods to the port of San Diego or elsewhere, and there deliver them unto the libelant in like good order as received, certain perils in said agreement mentioned excepted, or otherwise; denied that said Steamship Company received said merchandise on board of said steamship, but the contrary; and alleges that the case of books referred to in the libel was delivered to the Steamship Company by the libelant at San Francisco, to be by that company forwarded to San Diego, same to be so forwarded at the option of the Steamship Company on the steamship "Queen of the Pacific" or any other steamship which the said company should employ for that purpose; and such delivery was made to said Steamship Company under a special contract in writing relating thereto, made on the 28th day of April, 1888, between the libelant and the said Steamship Company, which is referred to in said libel, and a copy thereof attached thereto and made a part thereof.

III. Admits that the steamship sailed from the port of San Francisco bound to the port of San Diego with the said merchandise on board; admits that the same was not delivered at San Diego; admits that the same was returned to San Francisco; admits that the same was damaged by reason of having been wet with sea water, but denies that the same was so wet during the voyage, or by reason of the negligence of the steamship company, or its officers or servants; denies that by reason of any negligence the sea water gained access to the interior of the ship where the merchandise was stowed on the 30th day of April, 1888, or at any time.

It is then denied that the vessel was within the Northern District of California when the libel was filed; that libelant has not sustained any damage; or that the premises in the libel alleged are true, except as specifically admitted to be so.

(Articles IV, V, VI.)

VII. Alleges that the contract, a copy of which is attached to the libel, is a contract between libelant and steamship company individually, and not with said company as agents of the steamship "Queen of the Pacific"; and further, that said contract was entered into in the State of California by persons resident therein, and was to be performed in said State, and the damage to said merchandise, if any, occurred in said State.

VIII. Alleges that at all the times in the libel referred to the said steamship company was the owner of said steamship; that it was engaged in carrying passengers and merchandise by water and pursuant to special contracts relating to such carriage, and during that time employed the steamship "Queen of the Pacific," and numerous other ships in performing its obligations under such special contracts; that the merchandise of the libelant was placed on board said steamship by said steamship company for carriage to its destination, pursuant to said contract with the libelant, not because such contract required it should be so placed or carried, but because it suited the convenience of the steamship company that it should be so placed and carried.

As a further and separate answer and defense, it is alleged:

I. That the steamship sailed from San Francisco about 2 o'clock P. M., on the 29th day of April, 1888, and proceeded on her voyage. No unusual incident was known to occur during the said 29th day of April, but that about 1 o'clock A. M. on the 30th day of April, she was discovered to have sprung a leak, and then proceeds to describe generally the effect of that leak, the steps taken to relieve the vessel of water, and then states that at about 7 o'clock A. M., on the 30th of April, the vessel was "run upon the beach at Port Harford," where "sea "water immediately came over her deck, and nearly filled "the vessel with water, and thereby said merchandise "became wet with sea water"; that the vessel was purposely beached to prevent the disaster from being more serious.

II. It is then averred that before the vessel sailed from San Francisco, the steamship company had exercised due diligence to make her seaworthy for the voyage, and that the merchandise of the libelants had been returned to and delivered to them at San Francisco. (Articles II and III.)

IV. 1. That the goods were received, carried and delivered in pursuance of the laws of the State of California, and the provisions of a special contract, a copy of which is attached to the libel (*i. e.* "the thirty-day clause.").

2. That the causes of action in said libel are barred by the laches of the libelant in prosecuting the same, and

refers specifically to "*the thirty-day clause*" on the back of the bill of lading, and avers that the libelant did not present to the Company within the thirty days mentioned therein its claim for damage, nor was the libel filed within said thirty days or at any time prior to the 29th day of April, 1892; that the steamship was not at that time in the Northern District of California, nor was she seized under process issued under the libel until the 4th day of May, 1892; that the merchandise was wet with sea water on the 30th day of April, 1888, and that this fact was known to the libelants prior to the first day of May, 1888.

It then alleges that the action is barred by Sections 337, 338 and 813 of the Code of Civil Procedure of the State of California, and also that the action is barred by reason of the libelant not having seasonably prosecuted his suit.

Section 813 of the Code of Civil Procedure, referred to above, is as follows:

Subdiv. 5: "For nonperformance or malperformance of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents or consignees;

"Demands for these several causes constitute liens upon all steamers, vessels and boats, * * * but such liens only continue in force for the period of one year from the time the cause of action accrued."

The answer to the second cause of action of Bancroft-Whitney Company is, *mutatis mutandis*, the same as that to the first cause of action, except in Article IV of the further and separate answer to the second cause of action (Rec., p. 41, Subdiv. e.), it is averred that by

reason of the delay in commencing the proceeding it would be deprived of the testimony of three witnesses, Ingraham, Esmelts and Johnson, by whose testimony it could be established to the satisfaction of the Court that the dead lights of the steamer were closed and well fastened when she sailed on her voyage. (Rec., p. 41.)

It appears from the record (p. 145) that Frank Esmelts, one of the three witnesses, was called at the trial and testified as to this matter. It does not, however, appear in the record that the testimony of the other witnesses could not have been procured. It does not appear from the record that testimony was introduced by the libelants to controvert the testimony of Esmelts in respect to the condition of the dead lights; nor does it appear that the condition of the dead lights, when the vessel sailed, was put in issue by the pleadings, or otherwise.

The answer to the libel of Hellman, Haas & Co. is, in all matters material to the present inquiry, substantially the same as the answer to that of Bancroft-Whitney Company. (Rec., p. 42 *et seq.*)

The cause having been brought on for hearing on the merits, Abraham Haas and E. W. Newhall were called as witnesses on behalf of the libelants Hellman, Haas & Co., for the purpose of proving the damages sustained by them. To the admission of the testimony of these witnesses objections were interposed by counsel for claimant, which were overruled by the Court and the testimony admitted. To the admission of this testimony the claimant assigns error. Their testimony, so far as the same

is material, will be fully set forth in connection with the examination of this assignment of error.

The examination of these witnesses being concluded, counsel for libelants announced "that under the pleadings this is our case and we rest." (Rec., p. 70.)

Thereupon counsel for claimant moved on behalf of the steamship company for a judgment of nonsuit on the grounds stated in the exceptions to the libel, and also in the answers. (Rec., p. 70.) The matter having been argued by counsel and the Court having advised thereon, denied the motion. (Rec., p. 76.)

Thereafter, such further proceedings were had that the Court ordered judgment for the libelants, with reference to the Commissioner to assess damages. (Opinion, Rec., pp. 153–171.)

Thereafter (Rec., pp. 172–3) the Commissioner, to whom the matter was referred, made and filed his report, by which it appears that he found as damages to Bancroft-Whitney Company the sum of $200 as stipulated by counsel, as appears in opening statement of counsel for libelants. (Rec., p. 53.)

On the hearing before the Commissioner in respect to the matter of the damages sustained by Hellman, Haas & Co., counsel for libelants offered and put in evidence the testimony of Abraham Haas, hereinbefore referred to (Rec., pp. 55 *et seq.*), and that of E. W. Newhall (Rec., pp. 62 *et seq.*). To these several reports of the Commissioner the claimant filed exceptions (Rec., pp. 176–7–8), the substance of which is that neither the witness Haas or Newhall were competent witnesses "to

"testify to any fact relating to the value of or damage "to the merchandise, and that the evidence was not "sufficient to sustain the report as to the finding of "damages." These exceptions were overruled and a final decree was entered in favor of the several libelants for the amounts found due to them respectively. (Rec., pp. 178-9-80.)

From this judgment the claimant appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of the Court below. Thereupon the claimant petitioned this Court praying that a writ of *certiorari* issue to said Circuit Court of Appeals, which was allowed, and the whole record has been brought and now is, before this Court by virtue of said writ.

Although the material questions to be discussed, as raised on the record, are few, yet fifty assignments of error are interposed, many of which are in substance but a repetition, in a different form, of the others. Those which counsel for libelant deems material will, omitting minor points, be stated and discussed under appropriate subdivisions of his brief of argument.

BRIEF OF ARGUMENT.

I.

The first exception to the answer is, in substance, "*For that the said libel * * * shows that the* "*libelant * * * has no cause of action against and* "*no lien upon said steamship 'Queen of the Pacific'.*" (R., p. 22.)

UNDER THE FACTS OF THE CASE THIS EXCEPTION CANNOT, FROM ANY POINT OF VIEW, BE SUSTAINED.

" Received of Bancroft-Whitney Co. to be shipped on " board the steamer ' Queen of the Pac.' or on board of " any other steamer of the Company, or on board of " any other steamer the Company may employ, the " following property in apparent good order * * * " " to be delivered at San Diego * * * " is, *inter alia*, the language of all of the bills of lading issued to the respective libelants. (R., pp. 8, 9, 14, 17.)

All the merchandise described in the several bills of lading was delivered to and received by the Steamship Company for shipment, and was by it shipped on board of the steamer " Queen of the Pacific" for transportation according to the terms of the bills of lading. The fact that the Company was privileged to ship the merchandise on some other vessel, owned or employed by it, does not affect the legal rights of the consignors as to a lien on the carrier ship, or otherwise. Forty years ago it was determined by this Court in *Bulkley* v. *Naumkeag Steam Cotton Co.*, 24 How.. 386, 391-2-3-4, that the delivery of merchandise to the carrier to be by him shipped upon a partic ular vessel, gave rise to a lien on that vessel in case the merc handise was damaged from a cause not within the perils excepted in the bill of lading. Here the merchandise was actually shipped by the Steamship Company on the " Queen of the Pacific".

II.

THE THIRD EXCEPTION, TO THE OVERRULING OF WHICH ERROR IS ALLEGED, AND RELIED UPON, IS THAT ALL THE CAUSES OF ACTION IN SAID LIBELS SET FORTH " * * * are in the said several libels shown to have been waived and aban-

doned by the libelants" "prior to the filing of the said libels," "under the provisions of a special contract made "in that behalf by each of said libelants with the said "Pacific Coast Steamship Company, as in said libel "alleged." (R., p. 22.) (Assignment of Error II, R., p. 181.)

The special contract—the 30 day clause—referred to in the foregoing exception is the following:

"It is expressly agreed that all claims against the *P.* "*C. S. S. Co.*, or any of the *stockholders of said Com-* "*pany*, for damage to or loss of any of the within mer- "chandise, must be presented to the Company within "thirty days from date hereof, and that after thirty days "from date hereof, no action, suit or proceeding, in any "court of justice shall be brought *against said P. C. S.* "*S. Co., or any of the stockholders thereof*, for any dam- "age to or loss of said merchandise; and the lapse of "said thirty days shall be deemed a conclusive bar and "release of all right to recover against *said Company, or* "*any of the stockholders thereof*, for any such damage or "loss."

This stipulation is divided into three clauses:

1. That "*All claims against the Pacific Coast Steam-* "*ship Company, or any of the stockholders of said Com-* "*pany*, for damage to or loss of any of the within mer- "chandise, must be presented to the Company within "thirty days from the date hereof;"

2. That "*after thirty days from date hereof*, no "action, suit or proceeding, in any court of justice, shall "be brought *against said Pacific Coast Steamship Com-*

" *pany, or any of the stockholders thereof*, for any dam-
" age to or loss of said merchandise;"

3. That " the lapse of said thirty days shall be deemed
" a *conclusive* bar and release of all right to recover
" *against said Company, or any of the stockholders there-*
" *of*, for any such damage or loss."

The first clause, taken apart from the immediately succeeding clause, is, in case it be not complied with, valueless for any practical purpose, because no penalty is denounced against the shipper or holder of the bill of lading in case he does not present his claim within the thirty days from the date thereof. It contains no provision that, in case his claim is *not* presented within the time limited for that purpose, neither the Company or its stockholders shall be held liable for any such damage or loss. To give, therefore, any practical effect to this clause, it must be construed in connection with the succeeding clause relating to the limit of time in which a suit against the Company or its stockholders can be brought. Taken in this connection, the second clause is unreasonable, in this,

Because the claimant for damages by reason of injury to or loss of the merchandise, has the whole of the thirty days,—to the last hour thereof,—in which to make the claim mentioned in the first clause; a privilege that, by the explicit terms of the contract he has a right to exercise, and this being so, there is no part of the thirty days remaining in which he can commence a suit or proceeding in respect of such damage, as the limit of time in which he may make his claim and the limit of time in

15681

which to bring his suit expire simultaneously. In other words, the carrier has clearly and unmistakably said to the holder of the bill of lading: "You may have the "whole of the thirty days in which to present your claim "for damage or loss, and after the expiration of this time, "whether you have or have not presented your claim, "you are barred to bring action in respect thereof against "the *Company* or any of its *stockholders*." This limitation gives the holder of the bill of lading a definite time in which to lay his foundation for bringing suit against the carrier company or its stockholders, and then if he avails himself, which as of right he may well do, whether of necessity or for convenience, of the whole of the stipulated time in which to present his claim, and having done this within the time limited, though it may be at the last minute thereof, declares that he is barred from bringing suit because not brought before the expiration of the thirty days' limitation.

If he does not proceed within the limited time, to the whole of which he has an option, then it is a denial of his right of action, and this without any default on his part. Manifestly this is unreasonable.

The limitation of thirty days from the *date* of the bill of lading, within which the merchant was required to ascertain the damage to his merchandise and bring suit therefor, is unreasonable. The question whether this limitation is reasonable or unreasonable is not to be determined by the accidents of a particular occasion, but in view of the probabilities that such delays may arise from injuries to the ship as will not allow the shipper

to ascertain within the period of thirty days the amount of his damage and put him a position to make the claim or bring a suit for the same before the expiration of this time. In this case the damage to the ship might have been of such a character as to have detained her, somewhere in the course of the voyage, for a period of the whole thirty days, if not longer. If the limitation had been confined to a period of thirty days after the damage had been ascertained, or could by reasonable diligence have been ascertained, the question presented would have been entirely different. This was substantially the view taken of it by the Circuit Court of Appeals, to which we respectfully refer. (Opinion, R., p. 208.)

III.

THIS LIMITATION IN THE BILL OF LADING, AS TO THE TIME IN WHICH A SUIT MAY BE BROUGHT, HAS NO APPLICATION TO THE PRESENT ACTION, WHICH IS A PROCEEDING *in rem* AGAINST THE CARRIER *ship* AND NOT AGAINST THE PACIFIC COAST *Steamship Company* OR ANY OF THE *stockholders* THEREOF.

We have seen that the language of this limitation is, (1) "After thirty days from the date hereof no action "* * * * * shall be brought against the *P. C. S.* "*S. Co., or any of the stockholders* thereof, for damage "to or loss of said merchandise;" (2) "and the lapse of "said thirty days shall be deemed a conclusive bar and "release of all right to recover *against said Company,* "*or any of the stockholders thereof*, for any such damage "or loss."

Now, the language of this clause is in *itself* clear, certain and unambiguous. The clause is in the nature of a statute of limitation, inhibiting, after the lapse of a certain time, the initiating of a suit or proceeding against the Pacific Coast *Steamship Company*, or against any of its *stockholders*, to recover damages for injury to or loss of, the merchandise embraced in the bill of lading.

Now, a proceeding *in rem* against a carrier ship of the Company to foreclose or enforce a maritime lien growing out of a breach of a contract of affreightment, is not inhibited in terms, nor can such inhibition be inferred from any reasonable or legitimate interpretation of the words used, or from the construction of the general language of the clause, and it is improbable, in the highest degree, that such a proceeding was contemplated by the Steamship Company when this clause was engrafted into its bill of lading. If it had been, it is reasonable to assume that it would have been inserted in the limitation, especially when the apparent care with which the clause is framed is taken into consideration. If the Company had in mind such an important provision, it would seem incredible that it would have left it to be ascertained by conjecture or the uncertainties of construction.

If, however, the Company intended to include in the limitation a proceeding *in rem* against its steamships, it certainly would not have expressed that intention in language so ambiguous, that to extend the clause so as to embrace such a proceeding would be equivalent to engrafting into it an entirely independent provision. Now, as this clause

is for the benefit of the Steamship Company, and as the language used is its language, if it has chosen to use such as does not clearly express this intention it is to be construed most strongly against it.

" I take the rule to be clearly established, as a general " rule, that words of exception in any instrument, are to " be construed most strongly against the party for whose " benefit they are introduced."

Story, J., in Palmer *v.* Warren Ins. Co., 1 Story, 360, **364**.

" The rule of construction as to exceptions is, that " they are to be taken most strongly against the party " for whose benefit they are introduced. The words in " which they are expressed are considered as his words, " and if he do not use words clearly to express his " meaning, he is the person who ought to be the " sufferer."

Per Lord Lyndhurst, in Blackett *v.* Royal Exch. Assur. Co., 2 Cromp. & J., 244, **251**.

In Fowkes *v.* M. & L. Assur. & Loan Assn., 3 B. & S., 917*, **925***, Cockburn, C. J., referring to the construction of a policy of assurance, said:

" In construing an instrument prepared by the com- " pany and submitted by them to the party effecting the " insurance for his signature, it ought to be read most " strongly *contra proferentes*."

See also,

The Caledonia, 157 U. S., 124, **137**.

Atwood *v.* Reliance Tr. Co., 9 Watts, 88.

N. J. Steam Nav. Co. *v.* Merchants Bank, 6 How., 344, 383.

Airey *et al. v.* Merrill, 2 Curtis, 8, 11.

Hooper *v.* Wells, Fargo & Co., 27 Cal., 28, 29, 39.

Mason *v.* Pritchard, 12 East, 227.

Another reason why exceptions in a bill of lading should be construed most strongly against the carrier is that he and the shipper "do not stand upon a footing of "equality. The individual customer has no real freedom "of choice. He cannot afford to higgle or stand out, "and seek redress in the courts. He prefers rather to "accept any bill of lading, or to sign any paper, that the "carrier presents; and in most cases he has no alterna-"tive but to do this, or to abandon his business."

Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 441.

Upon this subject it is needless to multiply authorities. The rule is too well settled.

IV.

The fourth exception to which error is assigned and relied on, is "that said libel and each of said libels "shows that the demand and demands asserted therein "and thereby is and are, and each of them is and all of "them are, stale, neglected, and legally abandoned, and "are barred by virtue of the laws of the State of Cali-"fornia relating thereto, to-wit: Sections 337 and 338 of "the C. C. P., and Sections 2174, 2909, and 2911 of the "Civil Code of said State." (R., p. 22.)

THIS IS A PROCEEDING *in rem*, IN A COURT OF ADMIRALTY TO ENFORCE A MARITIME LIEN ARISING FROM A BREACH OF CONTRACT OF AFFREIGHTMENT, AND SECTIONS 334 AND 338 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA DO NOT APPLY.

NOR IS SUCH A PROCEEDING WITHIN SECTIONS 2174, 2909 AND 2911 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA.

None of these sections have, under the statute or the maritime law of the United States, any application to the case at bar. They are merely municipal regulations that in no wise affect the administration by the Federal Courts of the maritime law of the United States.

"In the exercise of their admiralty and maritime juris-
"diction, the Federal Courts are governed solely by the
"legislation of Congress and the general principles of
"maritime law, and are not bound by State statutes."

Willard *v.* Dorr, 3 Mas., 91.

New Zealand Ins. Co. *v.* Earnmoor S. S. Co., 24 C. C. A., 644.

It has been repeatedly determined by the Federal Courts that a State statute, limiting the time in which actions are to be commenced, does not apply, *ex proprio vigore*, to a proceeding *in rem* to enforce a maritime lien.

In Brown *v.* Jones *et al.*, 2 Gall., 477, 481, it was held that the statute of limitations of Massachusetts applied only to suits at common law for mariners' wages, and not to suits in the admiralty. Judge Story, in the course of his opinion, said:

"It has, in the next place, been argued that it is "apparent from the allegations of the parties, that the "cause of action accrued more than six years before the "commencement of this suit, and that, therefore, it is "barred by the statute of limitations of Massachusetts, "which is substantially a copy of the Stat. 21, Jac. Ch. "16. The language of this statute does not seem appli- "cable to a proceeding in admiralty. A libel *in rem* or "*in personam* is not 'an action of account or upon the "case,' in the legal sense of those terms."

After reviewing the decisions upon this question, he says:

"The natural inference from this brief review of judi- "cial and parliamentary decisions is, that suits in the "admiralty are not within the statute of limitations of "21 Jac. Ch. 16; an inference which, in my judgment, "stands entirely confirmed by every rational construc- "tion of its language."

"* * * * And as the admiralty and maritime "jurisdiction is exclusively confided to the Courts of the "United States, it would be very difficult to maintain "that a statute of limitations of a State could, *proprio* "*vigore*, apply to suits on the admiralty side of these "courts. The provisions in the 24th section of the "judicial act (24th September, 1789, Ch. 20, Sec. 34) "extends only to trials *at common law;* and in no other "cases can State regulations or limitations govern the "courts of the United States, unless they fall within the "principles of universal law which direct and limit the "application of the *lex loci*. However, for the reasons

" already stated, I am entirely satisfied that the statute " of limitations of Massachusetts never was intended to " include suits in the admiralty."

In Willard *v.* Dorr, 3 Mason. 91, the same learned judge says:

" As far as I know, no statute of limitations not abso- " lutely addressed to a Court, has ever been admitted to " control its general jurisdiction over suits."

See, also,

The H. B. Foster, 3 Ware, 167.
The Platina, 3 Ware, 182.
Henry on Adm. Juris. and Prac., 185.

In *The Key City*, 14 Wall., 653, the question whether courts of admiralty are governed by any statute of limitations came directly before the Court. The State statute of limitations having been invoked by the claimant of a vessel as a bar to the proceedings, the Circuit Court sustained this defense, but the Supreme Court held the contrary and reversed the judgment of the Court below with directions to enter a decree for the libelant. In the opinion the Court stated the following propositions:

" 1. That while the courts of admiralty are not gov- " erned in such cases by any statute of limitation, they " adopt the principle that laches or delay in the judicial " enforcement of maritime liens will, under proper cir- " cumstances, constitute a valid defense.

" 2. That no arbitrary or fixed period of time has " been, or will be, established as an inflexible rule, but " that the delay which will defeat such a suit must, in

"every case, depend on the peculiar circumstances of "that case.

"3. That where the lien is to be enforced to the "detriment of a purchaser for value, without notice of "the lien, the defense will be held valid under shorter "time, and a more rigid scrutiny of the circumstances of "the delay, than when the claimant is the owner at the "time the lien accrued."

The Court further said: * * * * "We are of "opinion that if the claimants had shown an ordinary "case of purchase and payment without notice, the lapse "of time would protect them. While on the other hand "we are of opinion that if the claimant had been the "owner when the lien accrued it would not be a good "defense in this instance"

The important question in every case where this defense is raised is, therefore, are there "peculiar equitable circumstances" such as will defeat this suit by reason of the delay? This question can only be answered after an answer has been found to the other and fundamental question: *What are the "peculiar equitable circumstances" operating so as to defeat the suit by reason of the delay in instituting it?* These "peculiar equitable circumstances" are *any change of circumstances occasioned by the delay and materially and adversely affecting the rights of the respondent in the case*, such as loss of witnesses, transfer of ownership of the *res* to a *bona fide* purchaser for value, etc.

At the time of the trial of the case, the claimant neither proved nor attempted to prove any fact tending

to show that its rights had been in the slightest degree affected by the libelants' delay in commencing the proceedings against the vessel. To use the language of the learned Judge of the District Court:

"In the first place, it does not appear that the claim-
"ant, by this delay of four years, has been prejudiced in
"any of his rights, or that any defense which he could
"or would have presented has been impaired or jeop-
"ardized. It does not appear that claimant could or
"would have presented a stronger or better defense,
"had the action been commenced sooner. No pretense
"is made that, by reason of the delay, witnesses have
"died or gone away; or that testimony, once accessible
"and material to a defense of negligence, has been lost.
"In other words, there is no showing by claimant of any
"special or exceptional circumstances which would jus-
"tify this Court, as a court proceeding upon equitable
"principles, to hold that the libelants have been guilty
"of such laches as, in good conscience and equity,
"amounts to an equitable defense and bar to this libel."
(See Opinion, R., p. 155.)

SECTION 337 OF THE CODE OF CIVIL PROCEDURE WOULD NOT, UNDER THE CIRCUMSTANCES OF THIS CASE, BAR A PROCEEDING IN A COURT OF EQUITY.

The libelant's cause of action accrued on the 30th day of April, 1888, either when the ship was submerged at Port Harford or when she sprung a leak on the morning of that day. The libel was filed on the 28th day of April, 1892, less than four years after the cause of action had accrued, and on the same day process thereon was

issued and placed in the hands of the Marshal, and a *bona fide* attempt was made by him to serve it by a seizure of the *res*. The *alias* monition was not issued until after the Marshal had made his return *non est*.

Now, in a Federal Court, a suit in equity is commenced by filing the bill, suing out appropriate process and a *bona fide* attempt made to serve it. When this is done, it stops the running of the statute of limitations.

United States *v.* American Lumber Co., 29 C. C. A., 431, and cases there cited.

We fail to see why this rule should not be applied to proceedings instituted in a court of admiralty, which, within the scope of its powers, acts on equitable principles. Applying this rule to the present case, it is clear that this action was commenced within the time limited by Section 337 of the Code of Civil Procedure.

Whether where the proceeding is *in personam* the statute can be invoked as a defense. *Query.*

Reed *v.* Ins. Co., 95 U. S., 23, 33.

In view of the foregoing decisions the learned judge of the District Court was, we submit, right when he said:

"The question is one addressed to the sound discre-
" tion of the Court, depending upon all the facts of the
" particular case. It is, therefore, a question of evidence,
" to be determined hereafter upon the facts as they may
" appear." (R., pp. 27-28.)

All the exceptions to the libel having been overruled the claimant thereupon filed its answer, in which Sections 337 and 338 of the Code of Civil Procedure of California were pleaded in bar, and in addition thereto, Section

813 of that Code. (R., p. 41.) This section declares liens on vessels for certain causes therein enumerated, some of which would constitute liens under the general maritime law. Thus, subdivision 5 of this section declares a lien "For non-performance, or mal-per- "formance, of any contract for the *transportation* of "persons or *property between places within the State*, "made by their respective owners, masters, agents, or "consignees;" and subdivision 6, "For injuries com- "mitted by them to persons or *property*, in this State." For a breach of a contract of affreightment, and for a collision, liens arise under the maritime law, and the time within which a court of admiralty can exercise its jurisdiction in such cases is not to be limited or controlled by State legislation.

The last clause in this section provides that "such "liens only continue in force for a period of one year "from the time the cause of action accrued."

As the libelants did not proceed to enforce a lien under this statute, but to enforce a lien given by the general maritime law, this limitation therefore is not, in any view, a bar to this proceeding.

IF SECTION 337 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE COULD BE PLEADED IN BAR TO A PROCEEDING IN ADMIRALTY, IT IS NO BAR TO THE PRESENT ACTION.

2. Section 235, of Title II, Chapter III, of California Code of Civil Procedure, provides that "the periods "prescribed for the *commencement* of actions * * * are as follows:

"Section 337. Within four years: An action upon

"any contract * * * founded upon an instrument in "writing executed in this State".

Now, Chapter IV. of Title II, Section 350, declares that "an action is *commenced* within the meaning of this "title, when the complaint is filed."

The *filing* of the *complaint* is all that is necessary to stop the running of the statute.

Sharp *v.* Maguire, 19 Cal., 577.

When, therefore, Section 337 of the Code is invoked as a bar to the suit, it must be taken subject to the provisions of Section 350. If this view be correct, then the case is clearly not barred by Section 337, as the libels were, as we have seen, filed on the 28th day of April, 1892.

It is, therefore, submitted that there is no error in the overruling of the third and fourth exceptions, or in finding that the libelants were not, under the circumstances, guilty of such laches as to bar a recovery.

V.

THE NEXT EXCEPTION TO THE LIBEL, WHICH, FOR CONVENIENCE, WE WILL NUMBER (5,) IS, IN SUBSTANCE, THIS:

"And further excepting to said libel and said libels, "the claimant alleges that this Court has not jurisdiction "in the matter alleged, because the steamship 'Queen "of the Pacific,' was not, when said libels were filed in "this Court, within the Northern District of California." (R., p. 22; Assignment of Error IV, R., p. 182.)

THE PRESENCE IN THE DISTRICT, OF THE *res* PROCEEDED AGAINST WHEN THE LIBEL IS FILED, IS NOT NECESSARY TO GIVE THE COURT JURISDICTION OVER THE SUBJECT-MATTER OF THE LIBEL; IT IN NO WAY AFFECTS THE MARITIME NATURE OF THE CLAIM NECESSARY TO GIVE THE COURT JURISDICTION OVER *it*.

In a proceeding *in rem* in a court of admiralty, the jurisdiction or power of the court to adjudicate the case upon the merits, and dispose of it as justice may require, depends, (1) upon the maritime nature of the subject-matter of the proceeding; and, (2) that the *res* proceeded against is within the lawful custody of the court. *Immediate* jurisdiction over a contract, maritime in its nature, is *acquired* by the filing of the libel, and is *exercised* by issuing process thereon. Jurisdiction over the *res* is acquired by a legal seizure thereof on process issued for that purpose.

The Resolute, 168 U. S., 437.

The filing of the libel is necessary to give the Court jurisdiction over the subject-matter of the action, and to enable it to issue its process. It gives it no jurisdiction over the *res*. This is acquired only by virtue of a seizure thereof by the Marshal under the process of the Court issued to him for that purpose.

Miller *v.* United States, 11 Wall., 268, 294.

That this seizure must, however, be made within the territorial limits of the judicial district within but not beyond which the process of the District Court for such

district extends, is now too well settled to admit of controversy.

It appears from the record that the libel of the Bancroft-Whitney Company and that of Hellman, Haas & Company were severally verified and filed in Court on the 28th day of April, 1892. Both these libels contain the allegation required by Admiralty Rule 23, that "If "the proceeding be *in rem* that the property is within "the district." In Article IV of these libels it is alleged, "That said steamship is now within the North-"ern District of California." (R., pp. 6, 7, 12, 13.) There is nothing in the record to show, or to raise a presumption even, that this allegation was not true.

Had this averment been, inadvertently, omitted and process issued on the libel, whatever other consequences might have resulted from such an omission, we apprehend the libel would not have been dismissed for want of jurisdiction over the subject-matter of it, because this rule is one of practice and procedure, and not one affecting the jurisdiction of the Court over a maritime contract. "There is a wide difference between the power of the Court upon a question of jurisdiction, and its authority over its mode of proceeding and process."

The St. Lawrence, 1 Black, 522, 526.

Now, the cause of action was for a breach on the part of the carrier of his contract of affreightment, over which the Court, as a Court of Admiralty, had and could exercise jurisdiction, and it acquired this jurisdiction over this cause of action by the filing of the libel and exercised it by issuing its process, which it could not do until the libel

was filed, whether the relief sought were *in personam* or *in rem*. The issuance of process is a mere exercise of jurisdiction acquired by the commencement of the proceedings.

"By jurisdiction over the subject-matter is meant the "nature of the cause of action and of the relief sought, "and this is conferred by the sovereign authority which "organizes the Court, and it is to be sought for in the "general language of its powers or in authority specially "conferred."

This jurisdiction over the cause of action is entirely different from its jurisdiction over the person or over the *res*, which is acquired, in the first case, only by service of process on the *person*, and, in the second, by a seizure of the *res*. After the libel has been filed and process issued thereon, the Court can go no further until, in the one case, the person has been served or voluntarily appears, and in the other, until there is an actual seizure of the *res*, except, perhaps, as provided in Section 941, of the Revised Statutes of the United States.

"Jurisdiction of the *res* is obtained by a seizure under "process of the Court, whereby it is held to abide such "order as the Court may make concerning it."

Cooper *v.* Reynolds, 10 Wall., 308, **316, 317.**
Miller *v.* United States, 11 Wall, 268, 294.

The Court having jurisdiction over the cause of action, that is, the power lawfully conferred to deal with the general subject involved in the action, its power to issue process on a libel stating the jurisdictional facts necessary thereto, does not admit of a doubt.

If, therefore, we assume that the ship had departed from the territorial jurisdiction of the Northern District of California before the libel was filed, such departure did not oust the jurisdiction of the Court over the subject-matter of the suit, and it might be seized, as it was, on an *alias* monition on its return to the District, whether such seizure was made on the 4th day of May, or at any later day prior to the return day of the process.

Now, can it be successfully contended that such an arrest was unwarranted by reason of the vessel being out of the District when the proceedings necessary to make a seizure within the District were initiated. Suppose that after the libel was filed, it had been discovered that at that time the vessel had departed from the District, and therefore no process of arrest was issued, but on her coming afterwards within the District, it was issued, and an arrest made under it; could it be successfully maintained that such an arrest was a nullity? We respectfully submit that it could not.

In the case of the "L. B. X.", referred to in the Court below by counsel for claimant, and to which the attention of this Court may, perhaps, be called, the point here under discussion was not raised. In that case the seizure was made out of the territorial jurisdiction of the Court issuing the process, and it was held that the attachment was void, and the libel was dismissed, and, for aught that appears, on that ground only.

There is a strong analogy between a case where the *res* is without the territorial jurisdiction of the Court when the libel is filed, and one where it is in the hands

of a receiver appointed by a State Court, of co-ordinate jurisdiction, or in the hands of one appointed by a Circuit Court of the United States.

Where, in such cases, process *in rem* had been issued by a Federal Court, but the *res* was, at that time, in the hands of a State Court, of *co-ordinate* jurisdiction, on process issued by it, the Federal Court *refused to dismiss* the libel, but postponed its action thereon until the proceedings in the State Court were terminated.

The James Roy, 59 Fed. R., 784
The Sailor Prince, 1 Ben., 234.
The Oliver Jordan, 2 Curt., 414.
The E. L. Cain, 45 Fed. R., 367, 370.
Moran *v.* Sturges, 154 U. S., 256, and cases there cited.

In such cases, the *res* is as much out of the power of the Federal Court to reach it by its process, as though it were without the district. While, therefore, it had jurisdiction over the subject-matter of the suit, it had none and could get none over the *res* so long as that remained in the custody of the State Court, and when the hand of the latter was stayed, the Federal Court then proceeded to execute its process, because the *res* had then come within and was subject to, its jurisdiction.

So far we have dealt with the matter on the assumption that the vessel was not within the Northern District of California when the libel was filed. But what is the fact? These libels were verified, as we have seen, on the 28th day of April, 1892. That the vessel was within the Northern District of California, up to eleven o'clock

on that day, is not disputed. On page 69 of the Record, counsel for claimant said, "I think she sailed at eleven o'clock." So that the libels might not only have been verified but have been filed before that hour, and yet when the Marshal sought for the vessel she might have departed from the port, if not from the District. There is not a scintilla of evidence in the record to show to the contrary. The presumption is that at the time the libel was verified before a notary, the allegation that she was within the District was true, and the learned District Judge found that "there is testimony tending to establish the fact "that the steamship was within the jurisdiction of the "Court when the libel was filed." (Rec., Opinions 76, 171.)

The claimant, as a defensive allegation, avers in its answer "that when said libel was filed, said steamship "was and for four days and upwards continuously there-"after, she (said steamship) remained without the said "Northern District of California" (R., p. 33, Art. IV); and claimed in the Courts below that, inasmuch as the fact that she was within the District when the libel was filed, was denied, the burden of proving that she was then within the District was on the libelant. We submit that this contention, if now insisted on, is, in point of law, not well founded.

The allegation in the answer, is, in substance and effect, a plea in abatement to the jurisdiction, for matter not apparent on the record, and the burden of verifying such a plea is on the party pleading it.

Shepard *v.* Graves, 14 How., 505.

Gilmer *v.* City of Grand Rapids, 16 Fed. R., 707.
Foster *et al. v.* C. & St. L. Ry. Co., 56 Fed. R., 434.

It is, therefore, respectfully submitted that in the overruling of the (5th) and "further" exception to the libel, there is no error.

VI.

The sixth assignment of error, relied upon below, is to the overruling of the claimant's objection to the admission of the testimony of Abraham Haas and E. W. Newhall, witnesses called on behalf of the libelants. (*Rec., pp.* 182, 186, *Assignments* 6 *and* 7.

Abraham Haas, called as a witness on behalf of the libelants, Hellman, Haas & Co., after testifying that on the 27th day of April, 1888, he was a member of the firm of Hellman, Haas & Co.; that this firm had merchandise on board of the steamer "Queen," consigned to his firm at Los Angeles, at the time she departed from San Francisco on the voyage in question; that a paper shown him, and marked "Merchandise on Steamer 'Queen'," was either the bill or a copy of the bill which was handed to Gutte & Frank for the goods shipped on the "Queen," the following questions were propounded to him by counsel for libelants:

Mr. Andros—Q. Do you know what goods were shipped on board of her? A. I know by the bills.

Q. Please to state. Refresh your memory from that paper and state what they were.

Mr. Towle.—I object to any testimony from that paper.

Mr. Andros.—Q. In whose handwriting is that?

A. This is in the handwriting of a clerk of ours who was with us then, and who is now with us in Los Angeles.

The Court.—Q. Do you know anything about that paper yourself?

A. Nothing more than I told the young man to make it out at the time. He made it out under my supervision. * * *

Mr. Andros.—Q. I will ask you to see, as I read this, whether it corresponds with what is on the back of this bill of lading: "50 cases of canned vegetables."

Mr. Towle.—We object to that as irrelevant, immaterial and incompetent, whether it agrees with the memorandum or not.

Mr. Andros.—I propose to prove the cost price of these goods by Mr. Haas, and I want to simply identify these goods by that memorandum so that he may testify as to the cost. * * *

Mr. Towle.—So far as it has a bearing upon the question of price, if the witness proposes to testify from that memoranda as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading as from a memorandum which agrees with those items.

The Court.—His memorandum probably has the prices attached.

Mr. Andros.—Yes, sir.

Q. Fifty cases of canned vegetables. What was the price of this, Mr. Haas?

Mr. Towle.—Q. Are you testifying from your memorandum or from your own knowledge?

A. I am testifying from the memorandum.

Mr. Andros.—Q. Did you at the time know the cost of these goods? A. Yes, sir.

Q. Did you buy them? A. Yes, sir.

Q. Bought them yourself here?

A. Either bought them myself, or they were bought under my supervision.

Q. So at that time you did know what they cost?

A. Yes, sir.

Q. Did you subsequently instruct that memorandum of that cost to be made? A. Yes, sir.

Q. At the time that you made that memorandum yourself, or had it made under your supervision, were the figures therein mentioned the true cost of those goods?

A. Yes, sir.

Mr. Towle.—We ask that that answer be stricken out. We object to that as irrelevant, immaterial and incompetent testimony; that the witness cannot prove these values by some figures appearing on a paper. * * * We submit that the only memorandum that can be used is one made by himself at the time. * * *

The Court.—Or under his direction.

The Witness.—It was our bookkeeper.

Mr. Towle.—But he directs somebody to make up a memorandum, and that party presents that to him; that does not authorize him to testify from it. * *

The Court.—He goes further than that—he says he knew it to be correct.

Mr. Andros.—Q. With reference to the time these goods were shipped, when was that memorandum made?

A. I suppose immediately after the ship went down.

The Court.—Q. I understand you to say that you knew that the charges there were correct at the time?

A. Yes, sir.

Q. At that time?

A. They were made from the invoices; copy of the invoices.

Mr. Towle.—Q. Mr. Haas, did you compare that memorandum with the invoices after it was handed to you?

A. That I am not sure of, but I imagine that I did. *

Q. Hellman, Haas & Co. still exists?

A. Their successors exist.

Q. Their books of account at that time still exist?

A. I think they do.

Q. You know from whom these goods were bought?

A. Yes, sir; they can be dug up if the books and papers are not destroyed. * * *

Mr. Towle.—We submit that this memorandum is not the best evidence.

The Court.—I think it comes within the rule that where a person knows the correctness of a book, he may refresh his recollection, although the entry may not have been made by him. Motion to strike out denied.

Mr. Towle.—Save an exception.

Mr. Andros.—What was the cost price of the 50 sacks of canned vegetables?

Mr. Towle.—We object to that question because the

answer will be based upon that memorandum which the witness holds in his hand.

The Court.—Objection overruled.

Mr. Towle.—Exception.

A. 100 dozen asparagus * * * $175.

Q. 250 kegs of nails * * *

Mr. Towle.—We object to that question so far as it is based on that memorandum. It is understood that all these questions are objected to, and exceptions saved.

The witness thereupon, in response to questions by Mr. Andros, proceeded to testify, from said memorandum, that the cost of 250 kegs of nails was $775; 400 sacks of rice, $2,100; 20 packages of tea, $86.40; 3 bbls. of currants, $66.55; 420 mats of rice, $861; 250 barrels of sugar, $4,921.09; 100 half barrels of sugar, $944.39; 10 cases salad oil, $90; 35 cases of pickles, $132.50; and 13 cases of drugs, $63.20. (R., p. 59.)

To all the aforesaid rulings of the court and the admission of the testimony of said witness as to the cost of the items of merchandise inquired of, the claimant assigns error. (R., p. 182, assign. VI.)

The libelant then called as a witness on behalf of Hellman, Haas & Co., E. W. Newhall. This witness testified that in April, 1888, he was a member of the firm of Newhall Sons & Co., auctioneers; that he remembered that goods were landed in a damaged condition at the sea wall from the steamer "Queen of the Pacific"; that he sold such goods at public auction, and that some of them were those of Hellman, Haas & Co.; that his firm

catalogued and advertised the goods, and he produced the catalogue used at the sale. (R., p. 62.)

Mr. Andros.—Q. Are you able to state what goods you sold for Hellman, Haas & Co.?

A. Identify them by catalogue? Q. Yes, sir.

Mr. Towle.—We object to that as irrelevant, immaterial and incompetent. Whatever goods he may have sold for Hellman, Haas & Company is immaterial from any view of this case. * * *

I say the price realized is immaterial. It does not tend to show the actual value of the goods; * * * they must prove the damage by some source which goes to the condition, and then experts can testify from that condition as to the extent of the damage. (R., p. 63.)

The Court.—Overrule the objection.

Mr. Towle.—Save an exception.

Mr. Andros.—Q. What were the articles that you sold in a damaged condition from the steamer "Queen, of the Pacific" that belonged to or were marked "Hellman, Haas & Company"?

A. They were marked "H. H. & Co." Are those the ones you want?

Q. Yes; what were they?

A. They were 420 mats of rice, 400 sacks of rice, 250 kegs of nails.

Mr. Towle.—This is all understood to be subject to the objection?

The Court.—Yes, sir.

The Witness.—20 packages of tea, 13 boxes of drugs, 10 cases of chow chow, 25 cases of pickles, 50 cases of

asparagus, 10 cases of Lucca oil, 250 barrels sugar, 100 half barrels sugar, 3 barrels currants. That is all.

Mr. Andros.—Did you, at the time of this sale, or about that time, notice the condition which the packages were in, with reference to being wet?

A. I don't remember; it is so long ago. The goods were damaged; that I remember very distinctly.

Q. What did these articles bring; what was the gross sale?

Mr. Towle.—We object to that as irrelevant, immaterial and incompetent, and not tending to prove the damage to the goods.

The Court.—Overrule the objection.

Mr. Towle.—Exception.

A. The gross sales were $1,262.20.

Mr. Andros.—Q. What was the net?

A. $1,190.09.

To all the aforesaid rulings of the Court in respect to the admissibility of the foregoing testimony the claimant excepted and assigns error. (R., p. 186.)

A WITNESS MAY USE A MEMORANDUM TO REFRESH HIS RECOLLECTION ALTHOUGH IT IS NOT MADE BY HIMSELF, IF HE SAW THE PAPER WHILE THE FACTS THEREIN STATED WERE FRESH IN HIS RECOLLECTION, AND HE CAN SAY HE THEN KNEW THEY WERE CORRECTLY STATED.

In Coffin *v.* Johnson, 12 Cush., 98, a copy of a notice containing a statement of the time, place, and cause of impounding certain cattle was shown, and at the trial one Fields testified that he was one of the field drivers. That they used a particular form of notice, and a form or

15694

copy of such notice was produced to the witness. The Court allowed the witness to examine it for the purpose of refreshing his memory over the objection of the plaintiff's counsel, and the Court said:

"It is insisted that the permission given to the wit-
"ness, Thomas B. Fields, to inspect the form produced
"by him for the purpose of refreshing his memory, was
"irregular and erroneous. And it is contended that the
"true rule of law on this subject restricts a witness to
"the examination of such papers merely as are written
"by himself, or by some other person with his knowl-
"edge, at or near the time when the facts recited in it
"occurred. But this narrow limitation is neither war-
"ranted by the authorities referred to, nor consistent
"with the reason upon which the practice is allowed. In
"1 Greenleaf on Evidence, Sec. 436, it is said that it
"seems not to be necessary that the paper should have
"been made by the witness himself, nor that it should
"be an original writing, but it is sufficient if the witness
"recollects that he saw the paper while the facts were
"fresh in his recollection, and remembers that he then
"knew that the particulars therein mentioned were cor-
"rectly stated. And in *Henry* v. *Lee*, 2 Chit., 124, it
"was determined that 'if a witness, in looking upon any
"'document, can so far refresh his memory as to recol-
"'lect a circumstance, he may inspect it; and it makes
"'no difference that it was not written by himself; for it
"'is his recollection and not the memorandum that is
"'the evidence.' * * * He was, therefore, very

" properly permitted by the presiding judge to use it for " that purpose."

In Horne *et al. v.* McKenzie *et al.*, 6 Clark & Finn., 627, 629, **644**, a surveyor made a survey or report which he furnished to his employers, being afterwards called as a witness, he produced a printed copy of his report, on the margin of which he had two days before, to assist him in giving his explanation as a witness, made a few jottings. The report had been made up from his original notes, of which it was in substance, though not in words, a transcript. This was objected to by defendant's counsel, and the objection was overruled, and the witness was permitted to examine the paper for the purpose of refreshing his recollection. In the House of Lords, the Lord Chancellor said:

" But I may say that in my opinion the witness was, " under the circumstances of this case, entitled to refer " to the paper to refresh his memory."

So, in Commonwealth *v.* Ford, 130 Mass., 64, it was held that a witness may be allowed, for the purpose of refreshing his recollection to what is stated at a particular time, to look at a printed copy of his own written report of the proceedings at that time, although the absence of the written report was not accounted for.

In Huff *v.* Bennett, 6 N. Y., 337, **339** (2 Selden), the Court said:

" Although the rule is that a witness, in general, can " testify only to such facts as are within his own knowl- " edge and recollection, it is well settled that he is per- " mitted to assist his memory by the use of any written

" instrument, memorandum, or entry in a book, and it is " not necessary that such writing should have been made " by the witness himself, or that it should be an original " writing, providing that, after inspecting it, he can speak " to the facts from his own recollection."

In Cameron *v.* Blackman, 39 Mich., 108, it was held that where a witness swears he has a recollection of the facts, it makes no difference that the memorandum he uses to refresh his memory was not from his own entries.

" A witness, to refresh his memory, may use a memo- " randum not made by himself, where, after using it, he " can recollect the facts stated in it and testify to them " as matters of present recollection."

Hill *v.* State, 17 Wis., 697.

In Dugan *v.* Mahoney, 11 Allen, 572, it was held that if a witness on looking at a memorandum made by him at the time, is able from it to testify to the delivery of goods, the testimony is admissible, though he has no present memory of the transaction and the memorandum itself has been held incompetent. Hoar, J., said:

" The rule is thus stated by Mr. Greenleaf, in his " treatise on Evidence, when giving the different classes " of cases in which writings may be shown to witnesses " to aid their recollection; ' Where the witness recollects " ' having seen the writing before, and, though he has " ' no independent recollection of the facts mentioned in " ' it, yet he remembers that at the time he saw it he " ' knew the contents to be correct. In this case the " ' writing itself must be produced in court, in order that " ' the other party may have the benefit of the witness'

" ' refreshing his memory by every part.' 1 Greenl. Ev.,
" Sec. 437. And see cases there cited. It is obvious
" that this species of evidence must be admissible in
" regard to numbers, dates, sales and deliveries of goods,
" payments and receipts of money, accounts, and the
" like, in respect to which no memory could be expected
" to be sufficiently retentive, without depending upon
" memoranda; and even memoranda would not bring
" the transaction to present recollection. In such cases,
" if the witness, on looking at the writing, is able to
" testify that he knows the transaction took place,
" though he has no present memory of it, his testimony
" is admissible."

See, also, 3 Jones on Evidence, Sec. 880, *et seq.*

Now, as the witness testifies that he knew the cost of the goods; that he bought them himself, or that they were bought under his supervision; that the memorandum from which he was requested to refresh his memory was made out under his supervision; that this memorandum was made immediately after he had heard that the ship had gone down; that he knew at that time the cost of the articles therein specified was correct; that the memorandum was made from the invoices or copies of the invoices; that when the memorandum was handed to him, though not sure that he compared it with the invoices, "but I imagine I did," we submit that a sufficient foundation was laid for the witness to be permitted to avail himself of this memorandum for the purpose of refreshing his memory, and that permitting him to do so was not error.

The testimony of both Haas and Newhall was material as tending to show the value of the merchandise in its damaged condition, and it would seem that no better way to ascertain this value could have been employed than by a public sale of it, after reasonable public notice that such sale would be made. This was done. (Newhall, R., p. 62.)

Had the merchandise been appraised as was suggested by counsel for claimant, still it would have been necessary that it should be sold, and the appraised value would not have determined the price which it would have brought at that sale. From the nature of the articles sold, it is evident that their submersion for several days in sea water, must, of necessity, have greatly damaged them.

It does not appear but that the sale was fairly conducted or that the prices realized were not all that the merchandise was worth; or that any greater price could have been realized at private sale had such an unusual method for the sale of a large quantity of damaged goods been resorted to.

VII.

The third subdivision of the VIIIth assignment of errors relied upon, is as follows:

Third.—That there is no proof that claimant, the Pacific Coast Steamship Company, or that the officers or crew of the steamer "Queen," the servants of the steamship company, *or that the officers or crew of the steamer "Queen," the servants of the steamship company*, have

been, or were, guilty of any negligence in the premises. (R., p. 187.)

The claimant in its answer admits that the merchandise of Bancroft-Whitney Company "was not delivered at San Diego; admits that the same was returned to San " Francisco; *admits that the same was damaged by rea-* " *son of having been wet with sea water*, but denies that " the same was so wet with sea water *during said voy-* " *age*, or by reason of the negligence of the steamship " company, its officers, and servants." (Ans., Art. III; R., p. 33; Art. II, p. 38.)

The same admission and denial are also made in the answer to the libel of Hellman, Haas & Company. (Art. III, R., p. 43; Art. III, R., p. 49.)

WHERE GOODS ARE SHIPPED AND THE USUAL BILL OF LADING GIVEN, PROMISING TO DELIVER THEM IN GOOD ORDER, THE DANGERS OF THE SEA EXCEPTED, AND THEY ARE FOUND TO BE DAMAGED, THE *onus probandi* IS UPON THE OWNERS OF THE VESSEL TO SHOW THAT THE INJURY WAS OCCASIONED BY ONE OF THE EXCEPTED CAUSES.

" At common law, a carrier by land is in the nature of " an insurer, and is bound to keep and carry the goods " entrusted to his care safely, and is liable for all loss, " and in all events, unless he can prove that the loss " happened from the act of God, or the public enemy, or " the act of the owner of the goods. Common carriers " by water, like common carriers by land, in the absence " of any legislative provisions prescribing a different rule, " are also, in general, insurers, and *liable at all events*, " for *every* loss or damage, *however occasioned*, *unless* it

15697

"happen by the act of God, or the public enemy, or by "some other cause or accident without any fault or "negligence on the part of the carrier and expressly ex- "cepted in the bill of lading."

"Carriers by water * * * are in the nature of "insurers, and are liable, as before remarked, in all "events, and from any loss, however sustained, unless it "happens from the act of God, or the public enemy, "or by the act of the shipper, or from some other cause "or accident expressly excepted in the bill of lading."

The Propeller Niagara *v.* Cordes *et al.*, 21 How., 13, **22, 23, 26.**

"After the damage to the goods has been established, "the burden lies upon the carrier to show that it was "occasioned by one of the perils from which he was "exempted by the bill of lading.

"Where evidence has been given proving the particu- "lar loss or damage within one of the dangers or acci- "dents excepted in the bill of lading, it is still competent "for the shippers to show that it might have been avoided "by the exercise of reasonable skill and attention on the "part of the persons employed in the conveyance of the "goods, but in this state of the case the burden is upon "the plaintiff to establish such negligence, as the affirm- "ative of this lies upon him."

Clark *v.* Barnwall, 12 How., 272, 280.
Rich *v.* Lambert, 12 How., 347, **356, 357.**
The Mascotte, 2 C. C. A., **399.**

"Such burden is not sustained by showing that the

" damage was occasioned by a leak, and suggesting that " it arose from some inexplicable action of the elements, " without negativing other causes of the leak, which " would leave the carrier liable."

The Emma Johnson, 1 Spr., 527.

" That the signing of the bill of lading acknowledging " to have received the goods in question, in good order " and well conditioned, is *prima facie* evidence, that, as " to all circumstances which were open to inspection and " visible, the goods were in good order; but it does not " preclude the carrier from showing, in case of loss or " damage, that the loss proceeded from some cause, " which existed but was not apparent, when he received " the goods, and which, if shown satisfactorily, will dis- " charge the carrier from liability. But in case of such " loss or damage, the presumption of law is, that it was " occasioned by the act or default of the carrier, and of " course the burden of proof is upon him to show that " it arose from a cause existing before his receipt of the " goods for carriage, and for which he is not responsible."

Hastings *v.* Pepper, 11 Pick., 43.
Hunt *v.* Propeller Cleveland, 6 McLean, 76.

" The shipper makes out his case by proving his con- " tract and the non-delivery of the goods."

Wheeler on Carriers, 252.

The same rule is applied to cases of damage.
Rich *v.* Lamber, 12 How., 347, 357.

See, also, Lewis *v.* Smith, 107 Mass., 334, 338.
The Compta, 4 Sawy., 375, 377.
The Lydian Monarch, 23 Fed., 298, **299.**
Christie *v.* Griggs, 2 Camp., 79, **80, 81.**

"When goods are damaged while in the possession of "the carrier, the presumption is that such damage arose "from his negligence, and the burden is on him to show "that it arose from a cause for which he was not re- "sponsible under the bill of lading."

In this case it was held that when goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his *default*, and the burden of proof is upon him to prove that it arose from a cause for which he is not responsible.

Nelson *et al. v.* Woodruff *et al.*, 1 Black, 157, **169.**
Hurt *v.* Propeller Cleveland, 6 McLean, 76.
Lawson on Carriers, § 245.
Angell on Carriers, § 202.
The Mohler, 21 Wall., 530, **533.**

It is not necessary for the plaintiff to *prove negligence* on the part of the carrier, although it be *averred.*

Chitty on Carriers, 142*.
Richardson *v.* London & S. C. Ry. Co., 7 Com. B., 832.
Dale *v.* Hall, Wils., 281.
Christie *v.* Griggs, 2 Campb., 79, **80, 81.**

In the case at bar, the carrier has neither brought the cause of damage within any of the excepted perils, but has not even attempted to do so by his pleadngs or proofs. It has not set up in its answer, as a de-

fense, any of the exceptions in the bill of lading, nor did it attempt to introduce evidence in respect to the cause of the leak. These are very significant facts, especially as it may, under the evidence, be fairly assumed that it must have known where the leak was, and the location of the injury which caused it, otherwise it could not have stopped it. Instead of setting up any of the excepted perils as a defense, it studiously avoided doing so.

"The conduct of a party in omitting to produce that "evidence in the elucidation of the subject-matter in dis- "pute which is within his power and which rests pecu- "liarly within his own knowledge, frequently affords "occasion for presumptions against him, since it raises a "strong suspicion that such evidence, if produced, would "operate to his prejudice."

1 Starkie on Evidence, 54.

Gulf & S. F. Ry. Co. *v.* Ellis, 4 C. C. A., 454, 456, and the cases there cited.

CAPTAIN ALEXANDER, having been recalled, testified as follows:

"*Mr. Andros.*—Q. If you did discover—I am not "asking you whether you did or not—the place where "this leak was, was it below the water line when the "ship was on an even keel?

"A. No, sir." (R., p. 106.)

* * * * * .

"*Mr. Andros.*—Q. When you raised the steamer at "Port Harford in order to do that, did you pump her "out? A. Yes, sir.

"Q. Was it necessary in order to pump her out to

15699

" float her to ascertain where the leak was? I do not " ask you what it was.

" A. I understand. Not necessarily so.

" Q. Did you understand where it was?

" *Mr Towle.—Personally*, yourself? No.

" *Mr. Andros.*—Q. Did you know, as master of that " ship, where it was?

" A. No, sir; I did not *know* where it was.

" Q. Did you send down a diver? A. Yes, sir.

" Q. How many times did the diver go down?

" A. I think some three or four times—five may be " —I don't remember exactly. That I could not say.

" Q. When he went down the first time, for what " purpose did he go?

" A. He went to see if he could find anything wrong " with the ship or a hole in her. The condition of her " bottom as far as he could see.

" Q. Did he go down at any time for the purpose of " stopping any leak that he might have found?

" A. I think he did; yes.

" Q. So far as you know, did he stop it?

" A. So far as I know, he did.

" Q. After he had gone down for the purpose of " stopping the leak, and returned, did you then com- " mence pumping her out for the purpose of floating " her?

" A. After all the bulkhead doors were secured from " the inside, we built a coffer dam around the forward " hatch, and we pumped her out.

" Q. You had to build a coffer dam around her in " order to free her from water? A. Yes, sir.

"Q. When she was pumped out, she would float, of "course? A. Yes, sir.

"Q. How long after she floated was it before she "started to come to San Francisco?

"A. I think we were here in about forty-eight hours "after she was floated.

"Q. Did she leak coming up to your knowledge?

"A. She made no water to my knowledge.

"Q. Was Captain Charles Goodall there during the "time she was being freed from water? A. Yes, sir.

"Q. How long after she sunk was it before Captain "Charles Goodall came down to the scene of the dis-"aster, if you recollect, or about how long?

"A. I think he arrived in about 24 hours. I could "not say positively. My impression is that he arrived "the next day. That is my impression. I think it was "the next day he arrived. He came down on the 'Santa "Rosa,' I know.

"Q. Was he there at the time when the diver went "down for the purpose of examining the bottom of said "ship? A. I think he was; yes, sir.

"Q. You testified the other day that an attempt was "made to discover where the leak was by looking along "the outside of the ship? A. Yes, sir.

"Q. Was that done by sending a man in a bowline "—I think you so testified? A. Yes, sir.

"Q. Did he go below the stringer of which you have "spoken? A. No, sir.

"Q. Whereabouts is that stringer located with ref-"erence to the dead lights of the ship—above them?

15700

"A. Just above the dead lights. The dead light is "close up on to the guard. It may be 6 or 8 inches— "something like that, but not far from that." (R., pp. 141, 142, 143.

CAPTAIN CHARLES GOODALL testified as follows:

"*Mr. Towle.*—Captain, you were connected with the "Pacific Coast Steamship Company in 1888? A. Yes.

"Q. In what capacity?

"A. President of the Company.

"Q. What, if any, had you to do with the vessels "belonging to the Company?

"A. General management.

"Q. With the Steamship Company? A. Yes, sir." (R., pp. 121, 122.)

While Captain Alexander was being examined as a witness, the Court put to him several questions, among which was the following:

"I will ask you another question, to which there may "be an objection made by counsel, and you need not "answer it until I determine the objection. After the "'Queen of the Pacific' was raised at Port Harford, *did "you discover the cause of the leak?*

"*Mr. Towle.*—We object to that.

"*The Court.*—What is the ground of your objection?

"*Mr. Towle.*—The objection is that it is not a part of "our case, and is not the theory on which we are trying "it, as to what may have been discovered after the ves- "sel had been on the rocks.

"*The Court.*—I appreciate the fact that you are trying "the case very thoroughly and on a very narrow margin.

" I think. for the time being, I will sustain Mr. Towle's " objection to the question put by the Court.

" *Mr. Towle.*—I would like your honor to withdraw " the question.

" *Mr. Andros.*—I would prefer that the objection be " sustained.

" *The Court.*—I do not want anything that the Court " does to change the theory of the case. I will with- " draw the question for the present and will see what " may come hereafter. I do not know what I may do " hereafter. (R., p. 104.)

Subsequently, Mr. Towle, counsel for the claimant, moved the Court that all the foregoing testimony relating to the question put by the Court be stricken from the record, which, after argument, and on objection of libelants' counsel, the Court declined to do. (R., pp. 129, 130, 131.)

VIII.

The 16th assignment of error is as follows:

" 16. *The Court erred in its conclusion that the cause " of action in the libels herein alleged is for a breach of " contract.*"

The 17th assignment is substantially the same but in another form. (R., p. 190.)

THE LIBELS ARE FRAMED IN ASSUMPSIT AND NOT IN TORT.

It is to be observed that, to use the language of Judge Story in The Adeline, 9 Cranch, 284, " No proceedings " can be more unlike than those in the courts of com- " mon law and admiralty." In proceedings at common

law the pleadings are to be construed closely and technically, oftentimes to the exclusion of substance, but "all "our courts of admiralty agree in regarding substance as "of more importance than form, in the proceedings "which come before it, and, therefore, any process in "admiralty is, in general if not always, sufficient, which "distinctly brings the substance of a case and the actual "parties before a proper court, in such way as to permit "the questions of the case to be investigated, its merits "ascertained, and justice done."

2 Pars. Ad., 369.

Now, as we understand the contention of claimant's counsel, it is that the allegation in the libel that the sea water, which damaged the libelant's merchandise, gained access to the ship through the *negligence* of the *owner of the ship*, as well as that of its officers and servants, constitutes a proceeding in tort and not in assumpsit.

The cause of this action is a contract of affreightment, which, in a formal manner, is declared on in the libel. After stating "the nature of the cause," as required by Admiralty Rule 23 to be "*a cause of contract civil and maritime*," it is alleged that on or about the 28th day of April, 1888, at the port of San Francisco * * * "the "libelant shipped in good order and condition, one case "of books on the steamship 'Queen of the Pacific,' * * "to be in and by said steamship transported to the port "* * of San Diego * * there to be delivered in "like good order and condition as when received, unto "Bancroft-Whitney Company; and the said *Pacific Coast* "*Steamship Company, when it received said goods on*

" *board of said steamship for transportation as afore-*
" *said entered into a contract of affreightment in writing*
" with this libelant, wherein it acknowledged to have
" received said goods in apparent good order, *and then*
" *and there promised and agreed to transport said goods*
" *to said port or place of San Diego, and there deliver*
" *them unto Bancroft-Whitney Company in like good*
" *order as when received*, certain perils in said agreement
" mentioned excepted. A copy of said contract in said
" writing herein referred to is hereto annexed and made
" a part hereof, from which it appears that the freight,
" $1.15, was prepaid. (R., pp. 5, 6, 10.)

The material parts of this contract are, for the purposes of this discussion, as follows:

" Received of Bancroft-Whitney Co., to be shipped
" on board the P. C. S. S. Co. steamer 'Queen of the
" Pacific' * * * the following property in apparent
" good order * * * to be delivered at San Diego
" to the Bancroft-Whitney Co. or assigns * * *"

The property is then described as " One (1) c. books," and then follow the words:

" Paid $1.15
" Smith
" Prepaid." (R., pp. 9, 10.)

It is then alleged that the steamship thereafter sailed from San Francisco bound to the port of San Pedro " with the merchandise on board, but *notwithstanding* " *said contract of affreightment*, said merchandise *was* " *not delivered to Bancroft-Whitney Company at said* " *port or place of San Diego, or at any other place*, in

"like good order as when received; but, on the con-
"trary, said merchandise was returned to said port of
"San Francisco in a greatly damaged condition by
"reason of having been wet with sea water during said
"voyage, which, by reason of *the negligence of said*
"*steamship company*, its officers or servants, gained
"access to the interior of said ship, where said merchan-
"dise was stowed, to wit, on or about the 30th day of
"April, A. D. 1888."

It is further alleged that in consequence of the injury and damage to said merchandise by sea water, the libelant sustained damages in the sum of two hundred and ten dollars. (R., pp. 5, 6; Libel, Art. II, III, V.)

Had the proceeding been at common law, we submit that under authority of Legge *v.* Tucker, 1 Hurl & Nor., 498, referred to with approbation by the Court in Atlantic & Pacific Railroad *v.* Laird, 164 U. S., 393, cited herein by claimant's counsel, it would clearly have been a declaration in assumpsit and not in tort.

The mere use of the word "negligence" in stating a cause of water entering the ship, does not necessarily constitute the proceeding one in tort, any more than the declaration in "*case*" in Legge *v.* Tucker, constituted that an action in tort and not in assumpsit.

"In a declaration in contract against a common carrier it is common, though not necessary, to allege that the goods were injured by the negligence of himself and his servants."

Gray, J., in School District *v.* Boston & H. & E. R. R. Co., 102 Mass., 552, 557, and cases there cited.

At common law, an action on the *case* was distinguished from one in assumpsit or covenant in that it was not founded upon any contract, express or implied, and a similar division existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. *Case* was in form *ex delicto* for a wrong unconnected with a contract.

1 Ch. Pl., 110.

Legge *v.* Tucker, 1 Hurl. & Nor., 498, was in form an action on the case, for the negligence of a livery stable keeper in the care and custody of a horse. It was held that the foundation of the action was a contract, and that whatever way the declaration was framed, it was an action of assumpsit. Pollack, C. B., said:

"Where the foundation of the action is a contract, in "whatever way the declaration is framed, it is an action "of assumpsit; but where there is a duty *ultra* of the "contract, the plaintiff may declare in case."

Per Watson, B.: "The action is clearly founded on "contract. Formerly, in actions against carriers, the "custom of the realm was set out in the declaration. "Here, a contract is stated by way of inducement, and "the true question is, whether, if that were struck out, "any ground of action would remain. There is no duty "independently of the contract, and, therefore, it is an "action of assumpsit."

Now, in the case at bar, the relation of the parties to each other was purely contractual. Their respective rights and duties are to be determined solely by the contract of affreightment entered into between them and

15703

declared on. The action is founded on a contract and not on any common law duty, consequently it is in the nature of an action in assumpsit at common law.

This view is strengthened by the case of Fleming *v.* Manchester, etc., Ry. Co., 4 Q. B. Div., 81. The material parts of the statement of the claim were that:

1. The plaintiff delivered to the defendants, as common carriers, a parcel of goods to be carried by defendants from Sheffield to Dundee.

2. That the defendants accepted the parcel of goods to be safely carried and delivered to the plaintiff at Dundee.

3. That the defendants did not safely carry and deliver the package of goods to the plaintiff at Dundee, but "so *carelessly and negligently* conducted themselves "with respect thereto, that the said parcel of goods was "and is wholly lost."

The defendants having paid into Court a certain sum of money which the plaintiffs accepted in satisfaction of their claim, thereupon applied to a Master to tax their costs, which he refused to do on the ground that the action was founded on a contract within the meaning of the County Courts Act of 1867, 30, 31 Vict. c. 142, sec. 5. (For the provisions of this Act, see Note 1 on p. 82 of the report of the case.)

The decision of the Master having been affirmed at chambers, the Queen's Bench Division, on appeal, ordered defendants to pay plaintiffs' costs. Defendants appealed. For the defendants it was contended that the action was "*founded on contract*," and the plaintiff not entitled to costs. For the plaintiff it was contended that

the action was a *tort*, and, therefore, the plaintiff was entitled to costs. The decision of the Queen's Bench Division was reversed. In its opinion the Court said:

"According to Bryant *v.* Herbert (3 C. P. D. L. R., "389) we have to determine whether the action is "'founded on contract or on tort,' and whether we are "to decide this question by looking at the form of the "pleadings or at the facts, it is clear that this action is "'founded on contract.' By paying money into Court "unconditionally, the defendants have admitted the truth "of the allegation set forth in the statement of claim. "These allegations seem in effect to amount to a charge "that, in consideration of the payment of hire, the de-"fendants promised to carry safely the plaintiff's goods; "and this clearly would have been, under the old forms "of pleading, a declaration in contract." (P. 83.)

So, in Taylor *v.* Manchester, S. & L. Ry. Co., 1 Q. B. Div. (L. R., 1895), 134, 140, the Court, approving of the decision in the case above cited, say:

"* * * If an action be brought against a common "carrier for non-delivery of goods, it is founded on a "contract, as was held in Fleming *v.* Manchester S. & "L. Ry. Co., and negligence need not be averred and "proved; so, also, if brought for a non-feasance; for then "the plaintiff cannot succeed without proof of a contract "and its breach." (140.)

In Baylis *v.* Lintott, 8 C. P. (L.R.), 345, the action was against a carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage. The declaration alleged that in considera-

tion that the plaintiff with her luggage, would become a passenger in such carriage, and a certain reward to be paid by the plaintiff to the defendant in that behalf, the defendant promised to carry the plaintiff and her luggage safely, but did not safely carry the plaintiff's luggage, but so *carelessly and negligently* conducted himself that part of said luggage was lost. Held, that the cause of action set forth in the declaration was "founded on contract."

In Pontifex *v.* Midland R. Co., 3 Q. B. D. (L. R.), 23, 26, the statement of the claim alleged that the plaintiff delivered goods to a railway company as a carrier, consigned to intending purchasers; that afterwards, and before the goods had been delivered to the consignees, the plaintiff discovered that the consignees were insolvent and gave notice to the defendant not to deliver the goods to the consignees, but to hold them to the plaintiff's order; before they were delivered to the consignees, the plaintiff also required the defendant to re-deliver them to him. Defendant refused to do so and delivered them to consignees, who absconded without paying for the goods. It was held that this was an action founded on tort and not on coutract, the action of the defendant amounting to a wrongful conversion of the goods. In the course of its opinion, on p. 26, the Court said:

"If there is an express contract, and the act com-
"plained of is a breach of it, the action is clearly foun-
"ded on contract."

Chapman *v.* State of California, 104 Cal., 690. This was an action to recover damages for the loss of a quantity of coal occasioned by the breaking down of a public

wharf on which it was deposited. The declaration alleges that the defendant in consideration of wharfage charges paid to its officers, received upon this wharf 150 tons of coal belonging to the plaintiff and to be removed by him from such wharf, and that the wharf broke and gave way, "by reason of the *negligence, omission and* "*carelessness* of the defendant, its officers and agents, in "failing and *neglecting* to keep said wharf in good and "sound condition and repair."

The defense was that the State was not liable in damages for the negligent acts of its officers engaged in discharging ordinary official duties, and if the action was to be regarded as one for the recovery of damages arising out of the negligence of the officers of the State in the discharge of strictly governmental duties, it could not be sustained.

The Court held that the action was not founded upon negligence constituting a tort, pure and simple, and unrelated to any contract, but was substantially an action for damages on account of a breach of contract, and that the alleged negligence and consequent loss of the goods entrusted to the wharfinger, was a breach of the terms of his contract, and his liability therefor could have been enforced at common law by an action of assumpsit. Citing Chitty of Pl., 114; Baker *v* Liscoe, 7 Term Rep., 171.

Now, if the facts set forth in the libelants' pleadings do not show that they have elected to sue on the contract we think it will be quite difficult to formulate a pleading in admiralty that will show such an election without

15705

resorting to the technical forms of pleading at common law, which is not required in a proceeding in admiralty.

IX.

THE STEAMSHIP "QUEEN OF THE PACIFIC" WAS UNSEAWORTHY WHEN ON THE 29TH DAY OF APRIL, 1888, SHE SAILED FROM SAN FRANCISCO ON THE VOYAGE TO SAN DIEGO AND WAY PORTS.

1.—WARRANTY OF SEAWORTHINESS.

"In every contract for the carriage of goods by sea, "unless otherwise expressly stipulated, there is a war- "ranty on the part of the shipowner that the ship is "seaworthy at the time of beginning her voyage, and "not merely that he does not know her to be unsea- "worthy, or that he has used his best efforts to make "her seaworthy; and this being so, his undertaking is "not discharged because the want of fitness is the "result of latent defects."

The Caledonia, 157 U. S., 124.
Work *v.* Leathers, 97 U. S., 380.
The Edward J. Morrison, 153 U. S., 380.

2.—WHAT CONSTITUTES SEAWORTHINESS.

"The vessel must be so tight that water will not "reach the cargo, so strong that the ordinary applica- "tions of external force will not spring a leak or sink "her, so sound that she will safely carry the cargo "through the ordinary shocks and vicissitudes of sea and "weather to which she must every day be subjected. If "she is capable of this she is seaworthy; if she is not "she is unfit for the navigation. No other test can be

" given, and this must be determined by the facts in " each particular case."

The Northern Belle, 9 How., 526, 530.
Putnam *v.* Wood, 3 Mass., 481.
Dupont de Nemours *v.* Vance, 19 How., 162.
Work *v.* Leathers, 97 U. S. 379.
Angel on Carriers, p. 150, Sec. 173.

3.—Presumption of Unseaworthiness.

Although it may be presumed that a vessel is seaworthy when she sails, still if soon after sailing she springs a leak without having encountered a peril sufficient to account for it, the presumption is that she was unseaworthy when she sailed.

" If a defect without any apparent cause be developed, " it is to be presumed it existed when the service " began."

Work *v.* Leathers, 97 U. S., 379.
Talcott *v.* Commercial Ins. Co., 2 Johns, 122, 129.

In this last case the vessel sailed in the morning, and at ten o'clock the same evening sprang a leak, and at two o'clock the next morning she filled with water, capsized and became a wreck. The cause of the leak could not be discovered. It did not appear that the vessel had struck the ground or met with any accident that could occasion a leak. A verdict having been rendered for the plaintiff, the Supreme Court of Judicature granted a new trial.

In the course of its opinion, the Court said:

"It has been urged by the plaintiff's counsel that every "vessel insured is *prima facie* to be deemed seaworthy.

" * * * * * * *

"This presumption is founded on the benignity of the "law, which will not presume a party to have violated his "implied stipulation; but when a state of facts is presented "from which a conclusion is to be deduced, in my opin- "ion this presumption of seaworthiness deserves no con- "sideration. 'For when,' says Marshall, (2 Marshall, "305), 'the ship becomes unnavigable or incapable of "'proceeding on the voyage insured, all the writers "'agree, that the presumption shall be, that this pro- "'ceeded from the age, rottenness or other defect of the "'ship, unless it be made to appear to have been occa- "'sioned by sea damage, or some unforseen accident.'

"If a vessel, after she commences her voyage, be- "comes unfit to prosecute it, without having been ex- "posed to any extraordinary peril of the sea, this may "authorize a strong presumption of unseaworthiness at "her departure, as to require strong evidence from the "assured to repel this presumption."

Court *et al. v.* Delaware Ins. Co., 2 Wash., 375.

"If it appears from the proof and circumstances attend- "ing, that the vessel was lost by springing a leak and "foundering in moderate weather, the presumption is "that this arose from weakness and internal defect, and "the burden of proof is upon the plaintiff to show that it "arose from stress of weather, or from collision or other

"external injury of an extraordinary character, coming "under the denomination of perils the sea."

Paddock *v.* Franklin Ins. Co., 11 Pick., 227, 237.

"Where a ship becomes so leaky or disabled as to be "unable to proceed on her voyage *soon after sailing on* "*it*, and this cannot be ascribed to any violent storm, "or extraordinary perils of the seas, the fair and natural "presumption is, that it arose from causes existing be- "fore her setting out of her voyage, and consequently "that she was not seaworthy when she sailed."

1 Arnold on Ins. (Am. Ed.), 689, 686.*

"If the underwriters can show that the ship, shortly "after sailing, without any visible or adequate cause, be- "came leaky, or otherwise incapable of performing the "voyage insured, this will be presumptive proof that she "was unseaworthy at the commencement of the risk."

2 Arnold on Insurance, 1361.

"Where the inability of a ship to perform its voyage "becomes evident soon after leaving port, and it found- "ers without stress of weather or other adequate cause "of injury, the presumption is that this liability existed "before setting sail, and that it is due to some latent "defect which rendered the vessel unseaworthy."

Walsh *v.* Washington Ins. Co., 32 N. Y., 427, 436.

The Planter, 2 Woods, 490.

See also The Gulnare, 42 Fed R., 861.

Higgie *et al. v.* American Lloyds, 14 Fed., 143.

Munroe *v.* Vandam, 1 Park on Ins., 469.

Marshall on Ins., 367.

After sailing from San Francisco on the afternoon of the 29th day of April, 1888, and up to 2:30 A. M., of the following day, April 30th, the ship encountered no gales or heavy seas, but only such winds and seas as are ordinarily encountered at that season of the year on a voyage from San Francisco to San Diego.

CAPTAIN ALEXANDER testified that after leaving San Francisco they had the wind about "two points abaft the "beam * * a leading wind."

"*Mr. Andros*—Q. In going down the coast upon "your various trips, you encountered wind and sea as "heavy as there were upon this occasion? A. Yes, "sir.

"Q. It was about what they call the ordinary weath-"er for that season of the year?

"A. No—ordinary weather? Yes, it was just the "same, like our north winds in the spring of the year; "like I had last trip. I had one trip the same kind of a "wind and sea going down.

"Q. The winds vary according to the season in "strength and velocity?

"A. The north winds do; yes." (R., p. 97.)

* * * * * *

"*Mr. Andros.*—Q. Are you aware that at any time "during her voyage that the ship struck anything until "she sunk? A. I am not.

"Q. She had no collision?

"A. Not to my knowledge. Nothing was reported "to me.

"Q. If there had been anything serious of that sort

" it would have been the business of the officer on deck,
" if he did his duty, to report it?

" A. Most decidedly so.

" Q. If anything unusual happened at any time dur-
" ing the trip, it would have been the duty of the officer
" of the deck to report that to you?

" A. Most decidedly so.

" Q. And when the leak was discovered, that was
" reported to you?

" A. Yes, sir." (R., p. 105.)

It appears from the testimony that the ship had a stringer or fender running along the side of the ship from a point about 20 feet from her stem to a point about 20 feet from her stern, and that the outer edge of this was about 14 inches out from the ship's side. (R., p 98.)

" *Mr. Towle.*—Q. With reference to that guard, how
" did the seas run alongside the 'Queen' upon that
" voyage? A. How did the sea run?

" Q. Yes, with reference to the guard. Did the sea
" run above it or below it, or how?

" A. It was running above it. Of course, the sea
" comes along. It was not all the time above it. Off
" and on. The sea would wash over the guard, away
" above the guard.

" Q. In your best judgment how frequently on the
" trip would the sea be above the guard along near the
" amidships of the vessel?

" A. I suppose four or five times a minute. Make it
" four times.

" *The Court.*—Q. When the vessel was on an even
" keel in still water, how would the guard be?

"A. It would be above the water.

"Q. How much?

"A. I am under the impression it was a foot and a "half above water. That is, the way she was loaded at "the time. If she was light it would be above that. "I am under the impression that guard was a foot or a "foot and a half above water. I may be mistaken, but "I would say that.

"*Mr. Towle.*—Q. Whatever the height of the guard "may have been above the water, it is your estimate that "the waves ran above the guard as often as you have "stated? A. Yes, sir." (R., p. 99.)

* * * * *

"*Mr. Andros.*—Q. You have spoken of a guard. I "want to find out something about that. How many feet "below the covering board was that guard placed?

"A. I suppose about eight feet below the covering "board.

* * * * *

"Q. You have seen a sea break over the top of that "on other occasions? A. Yes, oftentimes.

"Q. Nothing extraordinary about that, was there?

"A Not as far as the sea breaking over, no. I have "seen it lots of times break over the guard." (R., p. 101.)

The cause of the leak can, therefore, be attributed only to some defect, known or unknown, in the vessel when she sailed from San Francisco, and whether known or unknown is immaterial, so that it constitute unseaworthiness in the vessel at the time of her sailing.

If the carrier had shown the nature, location and extent of the defect in the ship which caused the leak, then the question whether it was caused by an excepted peril, or by some latent or other defect in the ship, would have been, comparatively, of easy solution.

"If a vessel during a voyage has leaked so much as "to injure the cargo, or render a jettison of it necessary, "one mode of testing seaworthiness is to ascertain what "defects, occasioning the leakage, were found in the "vessel at the end of the voyage, and which, if any, "existed when it was begun; and if any of the latter be "found, the remaining inquiry is, whether they are such "as to render the vessel incompetent to resist the ordi-"nary attacks of the sea, in the course of a particular "voyage, without damage or loss of cargo."

Dupont de Nemours *v.* Vance, 19 How., 162, 167.

The shipowner not having shown or attempted to show that the leak was consequent on an excepted peril, nor having shown or attempted to show the place, extent or nature of the defect by which sea water,—the proximate cause of damage to libelants' merchandise,—gained access to the interior of the ship, from which it might have been determined whether the defect arose from some excepted peril or from such an infirmity of the ship existing at the time she sailed on her voyage as to render her unseaworthy, raises against him the strongest presumption that she was unseaworthy when she sailed on the voyage in question, and this presumption should be resolved against him.

X.

The 26th assignment of error is as follows: "The "finding of the Court that an open deadlight on the "steamer "Queen" was the occasion of the damage to "said merchandise, is without any evidence to sustain "it, and is contrary to the evidence, and was and is and "is here assigned as error." (R., p. 191.)

No such finding was made by the District Judge. In his opinion (R., p. 163), referring to the deadlights, he says "Had one of them been negligently left open "when the vessel sailed the flow of water through such "an opening into the compartment might account for "the leak. The claimant introduced evidence tending "to show that the deadlights were all closed when the "vessel sailed from San Francisco, removing the pre-"sumption of unseaworthiness that might attach to the "unexplained condition of these openings at that time".

On p. 164 of the Record, he says, "The testimony "* * * does seem to point to an open deadlight as "the cause of the leak in the water-tight compartment."

He then refers to the facts which seem to point to this condition of things. (R., pp. 164-5-6.) The Court, after referring to the case of the "Majestic" where the deadlights were found to have been forced open by some accident and under such circumstances that the Court held it was "reasonable to infer it was "caused by an apparent and adequate cause rather than "by one which rests entirely upon surmise, and we are, "therefore, led to conclude that a blow from one of the

" floating planks inflicted the injury. * * * It was " an unanticipated peril of the sea."

" In the present case the evidence furnishes no such " explanation of the extraordinary occurrence, and the " Court is compelled to decide the case upon the weight " of presumption. In fact, as the proof now stands, " although claimant contends that the damage by sea- " water to the goods must be attributed to some " accident or danger of the sea or of navigation, he has " failed to show an accident, danger or casualty of the " sea from which the leak can be reasonably, or at all, " inferred. Nor has he accounted for the leak at all, *and* " *so far as the evidence in the case is concerned, the* " *Court is left in ignorance as to its cause.*" (R., pp. 166–7.)

" *The evidence is silent as to the cause of the leak,* " *and even the exact locality where the water gained* " *access to the vessel, was not disclosed by the evidence.*" (R., p. 158.)

This language entirely negatives the idea that the Court found that the leak was caused by an open dead-light.

XI.

THE 28th, 29th, 30th AND 31st ASSIGNMENTS OF ERROR RELATING TO THE RELATIONS EXISTING BETWEEN THE MAIDEBURG GENERAL INSURANCE COMPANY AND THE FIRM OF HELLMAN, HAAS & COMPANY, AND A. HAAS, J. BARUCH AND H. W. HELLMAN, SURVIVING PARTNERS OF THE FIRM OF HELLMAN, HAAS & COMPANY, WHO ARE THE LIBELANTS IN THIS CASE (R., p. 191), ARE SEVERALLY WITHOUT MERIT.

If the damaged merchandise of Hellman, Haas &

Company was uninsured, then the surviving partners had a clear right to bring the suit in their own name and for their own benefit. If, on the other hand, they were insured, then the insurance company was subrogated to their rights and could maintain the action in the name of the surviving partners of Hellman, Haas & Company. So that, whether the merchandise of Hellman, Haas & Company was or was not insured, or if insured and the loss paid, and this suit is maintained for the benefit of the insurance company paying in whole or in part the loss, is no concern of the claimant.

The Potomac, 105 U. S., 630, 634;
Hall & Long *v.* Railroad Company, 13 Wall., 367;
Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397;
Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S., 312, 320–21.

The owner of the goods insured may bring an action in his own name and account to his underwriter for the damages recovered up to the amount which the latter has paid, or the underwriter may bring in the name of the assured and account to him for any excess after having reimbursed himself to the amount which he has paid under the policy. It is no affair of the carrier who it is that will have the benefit of the recovery. It is sufficient for him to defend against any recovery at all, and such defense in no way depends upon how the damages that may be recovered against him may be subsequently disposed of.

XII.

IN THE COURT BELOW AND IN THE BRIEF ACCOMPANYING HIS PETITION FOR THE WRIT IN THE PRESENT CASE, THE CLAIMANT INSISTED AND INSISTS:

"*That the carrier's whole duty to the shipper is performed when it furnishes a seaworthy vessel, properly officered, manned and equipped, and is guilty of no negligence in handling or stowing the goods, or in navigating the vessel on the voyage.*"

This proposition as an abstract one, we do not controvert. As applied to this case its infirmity is, that it necessarily assumes that the ship was seaworthy at the inception of the voyage, which is a fact denied by the libelants. Their merchandise was damaged by seawater that entered the ship during the voyage, so soon after the commencement of it and under such circumstances as to raise a presumption that the vessel was unseaworthy when she departed on her voyage; and this presumption the claimant has not even attempted to rebut by proof that this leak was brought about by an excepted peril, and until he has done this he has not shown "an entire seaworthiness of the vessel to have existed at the inception of the voyage."

XIII.

IN THE COURT BELOW AND IN HIS BRIEF ACCOMPANYING HIS PETITION FOR THE WRIT IN THIS CASE, THE CLAIMANT CONTENDED AND CONTENDS:

"*That the stranding of the 'Queen' at Port Harford was a peril of the sea, and the approximate cause of the goods being wet with seawater, and that the 'Queen'*

"*was prima facie, and until negligence upon the voyage*
"*was shown, released from liability for damage so*
"*caused, by the express stipulations of the bill of lading.*"

Admitting that a stranding, either fortuitous or voluntary, is a peril of the sea, it is, under the facts and circumstances of this case, immaterial. If the leak in the ship was caused by a sea peril, that ends the controversy. If, on the other hand, the leak was caused by the unseaworthiness of the ship at the inception of the voyage, then the voluntary stranding to avoid a greater disaster to both ship and cargo which would otherwise result from such unseaworthiness, does not constitute a defense against libelant's claim for damages. The breach of the warranty of seaworthiness is not cured by the subsequent stranding of the ship rendered necessary by this breach.

In the Portsmouth, 9 Wall., 682, 684, Justice Strong, in delivering the opinion of the Court, said: "A loss by "jettison occasioned by a peril of the sea is, in ordinary "cases, a loss by perils of the sea. But it is well set- "tled that if a jettison of a cargo or a part of it, is ren- "dered necessary by any fault or breach of contract of "the master or owners of the vessel, the jettison must "be attributed to that fault or breach of contract, rather "than to the sea peril, though that may also be present "and enter into the case."

And in Lawrence *v.* Minton, 17 How., 100, 111, the Court said: "There can be no doubt that a loss by jettison occasioned by a peril of the sea is a loss by peril of the sea. In that case the sea peril is deemed the proximate cause of the loss. But if a jettison of a cargo be-

comes necessary in consequence of any fault or breach of contract of the master or owners, the jettison is attributable to that fault or breach of the contract, and not to a sea peril, though that also be present and enter into the case. This distinction is familiar in the law of insurance.

General Mutual Ins. Co. *v.* Sherwood, 14 How., 365, and cases there cited.

In this case, did the necessity for the jettison arise from any fault or breach of contract of the master or owners?

Now, we can see no difference in principle whether a sacrifice is made by a jettison of the cargo or by a stranding of the vessel. The latter is as much attributable to a breach of the contract of affreightment in respect to the seaworthiness of the ship as it is in the case of a jettison. The object and purpose of both are the same.

Under the pleadings and proofs and the rulings of the Court below, as disclosed by the record, it is respectfully submitted that there is no error apparent therein, and that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MILTON ANDROS,
Counsel for Libelants and Respondents.